

Office of Chief Counsel  
Internal Revenue Service  
**Memorandum**

Number: **200938022**

Release Date: 9/18/2009

CC:PA:02

POSTN-115804-09

UILC: 6013.04-00, 6011.01-00, 6707A.00-00

date: July 08, 2009

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subject: Section 6707A - Joint Liability of Husband and Wife

This memorandum responds to your request that our office provide an opinion regarding whether the penalty imposed under section 6707A is a joint and several liability when a husband and wife file a joint return reflecting the tax consequences of a transaction listed under Notice 2004-8 (Abusive Roth IRA Transaction) even though only one spouse engaged in the transaction. This advice may not be used or cited as precedent.

ISSUE

Whether the penalty imposed under section 6707A for failing to make the required section 6011 disclosure of a transaction listed under Notice 2004-8 is a joint and several liability of the husband and wife because they filed a joint return under section 6013.

CONCLUSION

The penalty under section 6707A for failing to make the required disclosure under 6011 of a transaction listed under Notice 2004-8 should not be treated as a joint and several liability of the husband and wife who filed a joint return under section 6013.

LAW AND ANALYSIS

Under the section 6011 regulations, each taxpayer who has participated in a reportable transaction and is required to file a tax return has a duty to disclose that transaction. See

Treas. Reg. § 1.6011-4(a).<sup>1</sup> A listed transaction is one type of reportable transaction. Treas. Reg. § 1.6011-4(b)(1) and (2). Listed transactions are those transactions the Service identifies in published guidance as tax avoidance transactions. Id. Treas. Reg. § 1.6011-4(c)(3)(A) defines who has participated in a listed transaction:

A taxpayer has participated in a listed transaction if the taxpayer's tax return reflects tax consequences or a tax strategy described in the published guidance that lists the transaction under paragraph (b)(2) of this section. A taxpayer also has participated in a listed transaction if the taxpayer knows or has reason to know that the taxpayer's tax benefits are derived directly or indirectly from tax consequences or a tax strategy described in published guidance that lists a transaction under paragraph (b)(2) of this section. Published guidance may identify other types or classes of persons that will be treated as participants in a listed transaction. Published guidance also may identify types or classes of persons that will not be treated as participants in a listed transaction.

When a husband and wife file a joint return and the joint return "reflects the tax consequences or tax strategy described in the" listing notice, section 1.6011-4(c)(3)(A) would generally operate to determine that each spouse has participated in the listed transaction for purposes of having to file a disclosure, even though only one spouse actively engaged in the transaction, unless the applicable listing notice specifically provides otherwise.

Notice 2004-8 (Abusive Roth IRA) was issued before section 6707A was enacted. The listing notice identified individuals known to be engaged in the abusive transaction and required them to disclose their involvement in the transaction under section 6011. Notice 2004-8 did not include a spouse in the list of individuals with a disclosure obligation. This is logical because the spouse is not deemed to have a beneficial interest in the account, and thus, has no responsibilities with respect to the account. Likewise, section 408(g) provides that the IRA rules are applied without regard to community property laws. Therefore, even in community property states, these rules treat the IRA as the sole property of the participating individual. Under these circumstances, since the inactive spouse was not included in the list of those required to disclose under Notice 2004-8, it generally would be inappropriate to impose a disclosure obligation on the inactive spouse now that a penalty may apply. Consequently, if only one spouse engaged in a Notice 2004-8 transaction it would be reasonable for the IRS to assess the section 6707A penalty only against the participating spouse.

We note, however, that to the extent that income is allocated to a taxpayer who engaged in a Roth IRA transaction, liability for tax on that income is joint and several even though the spouse of the taxpayer who participated in the listed transaction was arguably not a participant.

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<sup>1</sup> Several versions of regulations under section 6011 that relate to reportable transactions have been published over the last decade. The version of the regulations applicable to any particular taxpayer will generally depend upon the date that the taxpayer entered into the transaction. The references and quotes to the regulation here are from the current version of those regulations (TD 9350 7-31-2007). The ultimate conclusion reached herein, however, is not dependent upon any particular version of the regulations under section 6011.

Please call (202) 622-4940 if you have any further questions regarding this matter.